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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TYRONE SIMMONS,

Plaintiff and Appellant,

v.

CITY OF SAN DIEGO et al.,

Defendants and Respondents.

D074845

(Super. Ct. No. 37-2018-00001190-
CL-PT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Laura H. Parsky, Judge. Motion to dismiss appeal granted; remanded with directions to vacate the judgment and dismiss the cause as moot.

Morrison & Foerster, Mark C. Zebrowski, Suzanne Marinkovich, Benjamin S. Kagel; and Danielle Iredale for Plaintiff and Appellant.

Mara W. Elliot, City Attorney, Sanna Singer, Assistant City Attorney, and Michelle A. Garland, Deputy City Attorney for Defendants and Respondents.

Tyrone Simmons appeals from the denial of his petition to remove his name from California's shared gang database, CalGang, under recent legislation creating a removal

process. While Simmons's appeal was pending, Simmons's entry was removed from the shared gang database and the City of San Diego and San Diego Police Department (collectively SDPD) have asked this court to dismiss the appeal as moot. We grant the motion and direct the trial court to vacate its judgment and dismiss the petition.¹

LEGAL BACKGROUND

CalGang is a criminal intelligence system that operates pursuant to 28 Code of Federal Regulations part 23. (See Pen. Code, § 186.36, subd. (m).)² Over the past several years, the California Legislature has enacted various reform measures to help prevent errors in CalGang and to provide a mechanism for individuals to challenge their inclusion in the gang database. (§§ 186.34-186.36.)³

An individual can inquire whether his name has been included in a gang database and, if that person is "designated as a suspected gang member, associate, or affiliate in a shared gang database," that person may "request information as to the basis for the

¹ The Connie Rice Institute for Urban Peace and the American Civil Liberties Union of San Diego and Imperial Counties filed applications for leave to file amicus curiae briefs in support of Simmons. These applications are denied as moot in light of the disposition of the appeal.

² Subsequent undesignated statutory references are to the Penal Code.

³ A gang database is defined as "any database accessed by a law enforcement agency that designates a person as a gang member or associate, or includes or points to information, including, but not limited to, fact-based or uncorroborated information, that reflects a designation of that person as a gang member or associate." (§ 186.34, subd. (a)(2).) A shared gang database is "a gang database that is accessed by an agency or person outside of the agency that created the records that populate the database." (§ 186.34, subd. (a)(4).)

designation" in order to challenge it. (§ 186.34, subd. (d)(1)(A)-(B).) The law enforcement agency is required to provide the requested information in writing "unless doing so would compromise an active criminal investigation." (§ 186.34, subd. (d)(2)-(3).) The person designated as a suspected gang member, associate, or affiliate "may submit written documentation to the local law enforcement agency contesting the designation." (§ 186.34, subd. (e).) Within 30 days of submission of the written documentation contesting the designation, the law enforcement agency shall either grant or deny the request for removal from the gang database. (*Ibid.*)⁴ "If the law enforcement agency denies the request for removal, the notice of its determination shall state the reason for the denial." (*Ibid.*) During this process of responding to inquiries about inclusion in a gang database, and requests for removal from a gang database, the law enforcement agency may refuse to disclose "any information protected under Section 1040 or 1041 of the Evidence Code or Section 6254 of the Government Code." (§ 186.34, subd. (f).)

An individual whose request for removal from a gang database has been denied may petition the trial court to review the law enforcement agency's denial and request a court order directing the law enforcement agency to remove the person from the shared gang database. (§§ 186.34, subd. (e), 186.35, subd. (a).) "The evidentiary record for the court's determination of the petition shall be limited to the agency's statement of the basis

⁴ If the law enforcement agency does not respond within 30 days, the request for removal from the gang database is deemed denied. (§ 186.34, subd. (e).)

of its designation . . . and the documentation provided to the agency by the person contesting the designation" (§ 186.35, subd. (c).) The trial court conducts a de novo review to determine whether the law enforcement agency can "establish the person's active gang membership, associate status, or affiliate status by clear and convincing evidence"; if the law enforcement agency fails to meet its burden, "the court shall order the law enforcement agency to remove the name of the person from the shared gang database." (§ 186.35, subd. (d).) Pursuant to this petition process, a successful challenge to an individual's designation in a shared gang database results in the person's removal from that database.

FACTUAL AND PROCEDURAL BACKGROUND

Simmons submitted a letter to SDPD under section 186.34 inquiring whether he was entered into CalGang and seeking the basis for any entry. By letter, SDPD responded that Simmons was entered in the gang database in August 2007, and summarized seven contacts with police that supported Simmons's initial designation and continued entry in CalGang as a "documented . . . 'Lincoln Park' Gang Member."⁵ The SDPD's letter also explained that the agency was reserving the right to rely on

⁵ SDPD identified four contacts in 2007, two in 2008, and one in 2014. The contacts are alleged to reflect two admissions or instances of Simmons "claim[ing]" Lincoln Park (in 2007 and 2008); instances of Simmons associating with other known gang members (in 2007 and 2008); two arrests for unlawfully carrying a firearm (in 2007); and twice wearing gang colors (red on one occasion and green on another, in 2008). During the most recent incident in 2014, Simmons "was contacted by police leaving a gang party" of an "allied" gang on a date, April 20 (Easter), considered "important . . . in the history" of the allied gang.

information protected from public disclosure and to present that information to the court in any challenge to the agency's decision under section 186.35.

Simmons then made a written request to SDPD to be removed from CalGang pursuant to section 186.34, asserting he did not meet the criteria for inclusion, and that he was not a member of the Lincoln Park gang or any other gang.⁶ SDPD denied the request, repeating the same information contained in the earlier letter and indicating that Simmons was expected to be purged from the database on April 20, 2019, five years after his most recent qualifying contact with the police.⁷ (See 28 C.F.R. § 23.20(h) (2019).) The letter also notified Simmons of his right to seek review of SDPD's decision in superior court under section 186.35.

Simmons filed his petition under section 186.35 on January 10, 2018, asserting SDPD's decision should be overturned because it had not established Simmons's active gang membership, associate status, or affiliate status, by clear and convincing evidence. SDPD filed the administrative record, as required by section 186.35, subdivision (c), and

⁶ In addition to contending he did not meet the designated criteria for continued listing in the gang database, Simmons submitted information explaining he has been law-abiding following his release from prison in 2010, largely due to his commitment to his daughter. He further explains he has been fully employed, he started his own company in 2014, and he obtained a bachelor's degree in business management in 2015. Simmons has a close-knit family, and is actively involved in his community and his daughter's education.

⁷ In this letter, SDPD notified Simmons that it had considered his written submission as well as "all relevant information including that protected from public disclosure by [Evidence Code] [s]ection 1040 or 1041 . . . or [Government Code] [s]ection 6254 . . . and by [s]ection 28 [p]art 23 of the Code of Federal Regulations."

California Rules of Court, rule 3.2300(e), and both parties filed briefs in support of their positions.

In its brief, SDPD explained that, in addition to information disclosed to Simmons, it was in possession of privileged information that further supported its decision to deny his request for removal from the gang database. Citing section 186.34, subdivision (f), SDPD stated that it was not required to disclose this information and requested that the trial court review the information in camera. In response to Simmons's claim that he should have been purged from the database due to a five-year period (from 2008 to 2013) during which no new CalGang criteria were satisfied, SDPD stated it had privileged information for this time period and Simmons would not be purged from the system until April 20, 2019. To support its request for an in camera review, SDPD explained "public disclosure would compromise ongoing and future investigations, compromise law enforcement investigatory tactics, and improperly disclose intelligence and investigatory information."

In his brief, Simmons objected to SDPD's presentation of information relating to seven contacts, via a written letter, as inadmissible hearsay which was particularly problematic given concerns about the accuracy, transparency, and fairness of CalGang entries. Even if considered over his hearsay objection, Simmons contended the seven contacts did not establish he is an "active gang member" by clear and convincing evidence. Simmons described the evidence as weak because SDPD failed to provide details such as the officers involved in the interactions, what exactly was stated, and by whom. Simmons repeated the claim in his written submission that he should have been

purged from the database in 2013 (due to no qualifying contacts for the five-year period between 2008 and 2013), and objected to SDPD's submission of additional evidence, not presented to Simmons during the administrative process on his request for removal, for the court's in camera review.

The trial court held hearings over two days in March 2018, which included in camera review of the evidence that SDPD contended was privileged. At the end of the first hearing, the trial court recessed for approximately two weeks to allow SDPD to investigate whether "there may be some way to sanitize some of the information so that it would not disclose any privileged information and that way allow more of the proceedings to be public." The court provided this additional time for SDPD to "determine whether some of the information that was shared with the Court under seal can be made public" or "sanitize[d] . . . so that it does not include any privileged information." The court stated its intent "to narrowly tailor as much as possible the information that is not public."

At the continued hearing, following another in camera proceeding, the court found some of the information was privileged under Evidence Code sections 1040 and 1041, but other information was not. SDPD elected not to rely on the latter, non-privileged, information and the court therefore did not consider it in deciding the petition. With respect to the privileged information, SDPD agreed the court could disclose the date of the information (April 27, 2013) and that it was relevant to the criteria of "affiliating with documented gang members and . . . displaying gang symbols and/or hand signs."

After additional argument, the trial court explained it was relying solely on information regarding the April 27, 2013 contact, and the seven contacts outlined in SDPD's letter, in ruling on the petition.⁸ The trial court framed the issue as follows: "[A]s the Court understands it the argument is whether there is something in that gap between 2008 and 2014 that would authorize the continued placement of him on the gang database [¶] . . . [¶] [I]t's not disputed that since 2014 that Mr. Simmons has made great strides in terms of pulling himself out of the gang lifestyle, being productive with his life, associating and affiliating with different individuals, focusing on a job, focusing on community involvement, focusing on his family." The court ultimately denied the petition, finding SDPD had established Simmons's "active gang membership, associate status, or affiliate status" by clear and convincing evidence.

Simmons timely appealed. He contends SDPD failed to prove by clear and convincing evidence that he is an *active* gang member. He further contends that, in performing its de novo review, the trial court relied on inadmissible hearsay evidence and improperly considered evidence in camera which was not disclosed to Simmons, contrary to the governing statutes (§§ 186.34, 186.35) and in violation of his due process rights.

⁸ The trial court's minute order indicates that, in response to SDPD's "inquiry if anything was presented, in-camera, [regarding contacts] between 2008 and 2013, the Court responds that it is only considering information from April 27, 2013 and all of the information in the statement provided [in SDPD's letter] on August 3, 2017." SDPD conceded that there would be a "five year gap" without the privileged information from April 2013—which would have triggered the purging of Simmons's name from the gang database.

In this court, prior to briefing, SDPD filed a motion to seal the transcript of the in camera proceedings that took place in the trial court. We granted the motion, but subsequently discovered that the subject matter of the in camera proceedings had already been disclosed in the public record in another appeal decided by this court, *People v. Anderson* (Feb. 27, 2017, D069071) [nonpub. opn.] (*Anderson*)). In the pending appeal, SDPD took the position that the April 27, 2013 incident was privileged and demonstrated Simmons's "affiliation with documented gang members and displaying gang symbols or hand signs." The publicly available information from D069071 reveals, *inter alia*, the FBI was monitoring defendant Anderson's communications via a wiretap; Simmons communicated with Anderson on April 27, 2013 to purchase some liquor; and the communications captured on the federal wiretaps were transcribed and included in the trial court record as well as the record on appeal in *Anderson*.⁹

We sought supplemental briefing from the parties on the relevance of the public information to this case, including specifically whether remand to the trial court was appropriate. In their supplemental briefs, both parties assert remand is unnecessary, but for different reasons. Simmons argues remand is not necessary because the additional information from the *Anderson* case would not have impacted the trial court's decision. Simmons reasons that the trial court either already considered this information in camera—and this court "can rule on the privilege issue as a matter of law"—or, if this is

⁹ Although Simmons's name is not mentioned in the *Anderson* opinion, the opinion refers to the Lincoln Park gang, the existence of a federal wiretap, and the April 27, 2013 date.

new information, it is beyond the scope of the evidentiary record proscribed by section 186.35, subdivision (c), and should therefore be excluded. Simmons further asserts remand would be futile because, now that his name has been purged from the gang database, the trial court would likely dismiss his petition on remand.

In its supplemental brief, SDPD effectively concedes its claim of privilege regarding information in the *Anderson* case lacked merit, explaining: "If representatives for SDPD had known prior to or during the trial court proceedings that this information had been publicly disclosed, SDPD would have made different disclosures to Simmons in its statement of the basis for entry into CalGang, or in the course of the proceedings."¹⁰ In light of this information, SDPD contends remand to the trial court would be warranted under most circumstances to allow both parties to "consider additional disclosures, file additional pleadings, and make different or additional arguments to the court regarding Simmons' entry into CalGang." However, SDPD argues remand is not appropriate and would not be practical or effective here because Simmons's name was already removed from the CalGang shared gang database on April 20, 2019.

¹⁰ SDPD states its (erroneous) claim of privilege regarding the publicly available information was based on information known to it at the time of the trial court proceedings. However, SDPD does not explain how it failed to discover that there was no ongoing investigation relating to this incident, that evidence from the federal wiretaps was already public, and that details regarding Simmons's communications were previously disclosed in the *Anderson* case. Although the date was not provided to Simmons until the second court hearing, it does not appear counsel asked for time to confer with Simmons regarding the possible significance of this date, or that counsel requested a continuance to conduct further investigation (which could easily have led to the discovery of the *Anderson* opinion and the corresponding publicly available file).

SDPD also filed a motion to dismiss the appeal as moot in light of the fact that Simmons's entry in CalGang was already purged. Simmons opposed the motion to dismiss, asserting this court should exercise its discretion to decide the appeal because it raises issues of first impression and continuing public importance, and the harms faced by Simmons are capable of repetition but evading review.

DISCUSSION

As a general rule, it is a court's duty " ' 'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." ' ' (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541 (*Eye Dog Foundation*); *In re N.S.* (2016) 245 Cal.App.4th 53, 58.) However, "[i]n a proceeding that may otherwise be deemed moot we have discretion to resolve an issue of continuing public interest that is likely to recur in other cases" (*Daly v. Superior Court of S.F.* (1977) 19 Cal.3d 132, 141.)

Simmons does not dispute that this case is technically mooted by his removal from CalGang. Instead, he argues that his appeal raises important issues of continuing public importance related to the use of CalGang that warrant a decision. Simmons also asserts that this case is the first to consider the contours of the reform legislation, which was enacted to protect the public from erroneous inclusion in the database.

We conclude the appeal is moot and we decline to exercise our discretion to reach the merits of Simmons's claims. Under the unique facts of this case, there is no effective relief that this court, or the trial court on remand, can provide to Simmons. (*In re I.A.*

(2011) 201 Cal.App.4th 1484, 1490 ["When the court cannot grant *effective* relief to the parties to an appeal, the appeal must be dismissed."]; *Eye Dog Foundation, supra*, 67 Cal.2d at p. 541.) Section 186.35 establishes a procedure for individuals to challenge their inclusion in a shared gang database, allowing them to seek a court order directing their removal from that database. In accordance with this statute, Simmons requested in this appeal that we reverse the trial court's judgment and "remand[] to the trial court with instructions to enter an order to remove Mr. Simmons from CalGang." It is undisputed that Simmons was already removed from CalGang on April 20, 2019, while this appeal was pending, due to the absence of any additional qualifying entries for a five-year period. (28 C.F.R. § 23.20(h) (2019).) Because Simmons is no longer part of the shared gang database, we cannot grant him any effective relief. (*Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1178 (*Ebensteiner*) ["Generally, courts decide only 'actual controversies' which will result in a judgment that offers relief to the parties."].)

Remanding for the trial court to consider the fact that information regarding the April 27, 2013 incident is publicly available—contrary to SDPD's representations to the trial court—would similarly yield no effective relief to Simmons at this point. While remand would otherwise have been appropriate for the parties to make additional arguments based on this development, and for the trial court to consider the impact (if any) on its ruling on Simmons's petition, Simmons's removal from the shared gang database makes remand an unnecessary and ineffective exercise. No purpose is served by

remanding the case to the trial court now that Simmons has received the relief he was seeking, i.e., removal from CalGang.

We may exercise our discretion to consider the merits of Simmons's appeal "[w]hen an issue 'is one likely to recur while evading appellate review [citations] and involves a matter of public interest [citations].' " (*People v. Gregerson* (2011) 202 Cal.App.4th 306, 321.) Simmons contends this case justifies such discretionary consideration. We disagree that it is appropriate to consider the merits of Simmons's appeal given the unique facts here. Although the proper interpretation of sections 186.34 and 186.35 is an issue of public interest, the present case is not well suited for resolution of this issue. The trial court ruled on Simmons's petition based on the mistaken premise that events relating to the April 2013 incident were privileged, when in fact the information was already publicly disclosed. We do not know what impact, if any, this development would have had on the trial court's consideration of Simmons's petition—including the evidence it would have considered and the procedures the court would have followed on remand. Reaching the merits of Simmons's appeal at this time would be premature and we decline to render what would only amount to an advisory opinion. (See *Ebensteiner, supra*, 143 Cal.App.4th at p. 1179 [policy behind mootness doctrine is that "courts decide justiciable controversies and will normally not render advisory opinions"]; *B.C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 947 ["Courts are created to resolve cases and controversies and not to render advisory opinions or resolve questions of purely academic interest."].)

We also disagree with Simmons's assertion that the issues raised herein are likely to recur *and evade review*. (Cf. *Bracher v. Superior Court* (2012) 205 Cal.App.4th 1445, 1448, 1455 [court considered challenge to local rule requiring misdemeanor defendant's personal presence at a trial readiness and settlement conference, despite mootness of claim, where case involved issues "of public interest that are likely to recur, yet evade review," given "relatively short window to seek relief considering that the issue in an individual case will be moot after the readiness and settlement conference (and is premature until that conference is set)"].) First, beyond mere speculation, there is no basis to conclude that Simmons would again be entered into a shared gang database as a suspected gang member, associate, or affiliate. Second, even if he were designated in a shared gang database in the future, it is premature to conclude he would again be unable to challenge the law enforcement agency's designation or seek appropriate relief from the trial court, or this court (assuming he was not successful in pursuing his petition with the trial court). In sum, we are not convinced that the same controversy is likely to recur between the same parties (*City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 480), or that other individuals would be unable to challenge allegedly erroneous designations on shared gang databases. (*Bracher*, at pp. 1448, 1455.) It is speculative to conclude any future disputes regarding the statutes at issue—whether involving Simmons or other individuals—would evade review.

We next address the appropriate disposition of this appeal. Dismissal of an appeal implies affirmance of the trial court's judgment. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 134.) However, since we "do not reach the merits of the appeal in the

case at bench, it is appropriate to avoid thus 'impliedly' affirming [the] judgment[,]
which" found Simmons was appropriately included in the CalGang database. (*Ibid.*)
Since the basis for that judgment is now gone, we should " 'dispose of the case, not
merely of the appellate proceeding which brought it here.' [Citations.] That result can be
achieved by reversing the judgment solely for the purpose of restoring the matter to the
jurisdiction of the superior court, with directions to the court to dismiss the proceeding.
[Citations.] Such a reversal, of course, does not imply approval of a contrary judgment,
but is merely a procedural step necessary to a proper disposition of this case." (*Id.* at
pp. 134-135.)

DISPOSITION

The cause is remanded for the purpose of restoring the matter to the jurisdiction of the superior court, with directions to vacate the judgment and dismiss the petition as moot. The parties will bear their own costs on appeal.

GUERRERO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.